IN THE SUPREME COURT OF FLORIDA

NO. 79382

JERRY LEON HALIBURTON,

Petitioner,

v.

HARRY K. SINGLETARY, JR., Secretary

Department of Corrections, State of Florida

Respondent.

**PETITION FOR EXTRAORDINARY RELIEF,
FOR A WRIT OF HABEAS CORPUS**

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I. JURISDICTION TO ENTERTAIN PETITION, ENTER A STAY OF EXECUTION, AND GRANT HABEAS CORPUS RELIEF

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.020(a)(3) and Article V, section 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Haliburton's capital conviction and sentence of death. In February, 1998, Mr. Haliburton was sentenced to death and direct appeal was taken to this Court. The trial court's judgment and sentence were affirmed. Haliburton v. State, 561 So. 2d 248 (Fla. 1990). Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Haliburton to raise the claims presented herein. See, e.g., Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987).

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla.

1977); Wilson v. Wainwright, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson; Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Haliburton's capital conviction and sentence of death, and of this Court's appellate review. Mr. Haliburton's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. As shown below, the ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson; Johnson. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Jackson v. Dugger; Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n.4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal. See Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Wilson v. Wainwright; Johnson v. Wainwright. These and other reasons

demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Haliburton's claims.

With regard to ineffective assistance, the challenged acts and omissions of Mr. Haliburton's appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Mr. Haliburton's claims, Knight v. State, 394 So. 2d at 999, and as will be shown, to grant habeas corpus relief. Wilson; Johnson. This and other Florida courts have consistently recognized that the Writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, 287 So. 2d at 374-75; Powell v. State, 216 So. 2d 446, 448 (Fla. 1968). With respect to the ineffective assistance claims, Mr. Haliburton will demonstrate that the inadequate performance of his appellate counsel was so

significant, fundamental, and prejudicial as to require the issuance of the writ.

Mr. Haliburton's claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

II. PROCEDURAL HISTORY

On November 3, 1981, an information was filed against Mr. Haliburton alleging a burglary. The grand jury refused to indict Mr. Haliburton on first degree murder arising from the burglary. Subsequently, after the state obtained a statement from Jerry Haliburton's brother (the same day that the brother shot and tried to kill Jerry Haliburton) an indictment was obtained. The indictment was returned on March 24, 1982. Thereafter, the two cases were consolidated for trial.

Mr. Haliburton entered pleas of not guilty. His trial commenced September 6, 1983. He was subsequently convicted and sentenced to death. The conviction and sentence of death were reversed on appeal. Haliburton v. State, 476 So. 2d 192 (Fla. 1985). Subsequently, the United States Supreme Court vacated the reversal for reconsideration. Haliburton v. Florida, 475 U.S. 1078 (1986). On reconsideration, the reversal was reinstated. Haliburton v. State, 514 So. 2d 1088 (Fla. 1987).

On January 25, 1988, Mr. Haliburton's retrial began. He was convicted on both counts (burglary and first degree murder). On February 17, 1988, the jury was reconvened for the penalty phase. When defense witnesses were delayed in route to the proceedings, the judge refused to wait in order for the jury to hear the

mitigating evidence that the witnesses possessed. The jury was also improperly instructed to consider that the murder was "heinous, atrocious and cruel." The jury returned a death recommendation. The sentencing judge gave great weight to the jury's sentencing recommendation even though mitigation had been excluded by the judge's refusal to wait for the witnesses and the jury had been told to consider an improper aggravator. Mr. Haliburton was sentenced to death.

On appeal, Mr. Haliburton's convictions and sentence of death were affirmed. Haliburton v. State, 561 So. 2d 248 (Fla. 1990). On June 28, 1991, certiorari review was denied by the United States Supreme Court. Haliburton v. Florida, 111 S. Ct. 2910 (1991).

On January 18, 1992, a death warrant was signed by the Governor. Mr. Haliburton's execution was set for March 25, 1992.

III. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Haliburton asserts that his convictions and his sentence of death were obtained and then affirmed by the Court's appellate review process in violation of his rights as guaranteed by the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Haliburton's case, substantial and fundamental errors occurred in both the guilt and penalty phases of trial. These

errors were uncorrected by the appellate review process. As shown below, relief is appropriate.

CLAIM I

APPELLATE COUNSEL WAS SO INEFFECTIVE THAT NO RELIABLE ADVERSIAL TESTING OCCURRED.

Mr. Haliburton's direct appeal was marked by a total lack of advocacy, and is an egregious example of ineffective assistance of appellate counsel.[1] The lack of appellate advocacy on Mr. Haliburton's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. See, e.g., Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). Appellate counsel's initial brief presented approximately twelve pages of argument. Appellate counsel featured a technical claim that in the future, the Court should require special verdicts to differentiate between premeditated and felony murder. However, no mention was made of critical evidence such as testimony that Mr. Haliburton had told his brother "he didn't realize what he was doing until he saw the blood" (RII. 528). Barclay v. Wainwright, 444 So. 2d 956 (Fla. 1984); see also Heath v. Jones, 941 F.2d 1126, 1130-31 (11th Cir. 1991)(appellate counsel's performance was deficient where argument section of brief was only six pages long); Sharp v. Puckett, 930 F.2d 450, 452 (5th Cir. 1991)(in noncapital case, appellate counsel's

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[1]Claims II, III and IV of Mr. Haliburton's habeas corpus petition assert that appellate counsel provided woefully inadequate assistance during Mr. Haliburton's direct appeal, ignoring substantial meritorious issues regarding both Mr. Haliburton's conviction and death sentence.

performance was deficient where he filed a six-page appellate brief).

Appellate counsel's oral argument was similarly inadequate. See Wilson, 474 So. 2d at 1164 (appellate counsel's oral argument "demonstrated lack of preparation and zeal in urging his client's cause"). Counsel again featured the technical issue that in future cases, the Court should require special verdicts. Even after the court pointed out to counsel that this issue had been resolved adversely as far back as 1980, he persisted in arguing the issue. Finally, the Court bluntly advised counsel, "I think you've made your point. You have lots more to argue and not much time to argue it in." Counsel's lack of preparation became apparent when he responded, "There are some evidentiary rulings. I'll probably go through them in no particular order as they come to me." A little later counsel revealed his lack of familiarity with the record, "I'm pretty sure this came out at this trial as well as the first trial."

In the state's argument, the prosecutor simply observed that, "The first issue (the special verdicts claim) has been rejected many times and I will not dwell on it unless there are questions from the bench." The state then proceeded to argue the merits of the case and the evidence. Incredibly, although appellate counsel had only a minute and a half left for rebuttal, he addressed only the special verdicts claim. In his brief and oral argument, appellate counsel ignored much of the considerable factual evidence including Freddie's statement that Jerry

Haliburton had told him that he didn't realize what he was doing until he saw the blood. Counsel's written and oral presentations on direct appeal, along with the meritorious issues which were not presented, demonstrate that his representation of Mr. Haliburton involved "serious and substantial deficienc[ies]." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986).

The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Haliburton. "[E]xtant legal principle[s] . . . provided a clear basis for . . . compelling appellate argument[s]." Fitzpatrick, 490 So. 2d at 940. The issues were preserved at trial and available for presentation on appeal. Fitzpatrick, 490 So. 2d at 940; Johnson v. Wainwright, 498 So. 2d 938, 939 (Fla. 1986). Neglecting to raise "so fundamental an issue," Wilson, 474 So. 2d at 1164, such as Mr. Haliburton's claim that the trial court precluded the presentation of mitigating evidence to the jury "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Id. As this Court has observed, "[t]he propriety of the death penalty is in every case an issue requiring the closest scrutiny," Wilson, 474 So. 2d at 1164. Individually and "cumulatively", Barclay, 444 So. 2d at 959, the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original).

The ineffective assistance of appellate counsel is prejudicial to Mr. Haliburton as set forth in Claims II, III and IV of this petition. Prejudice also occurred because of this Court's failure to independently examine the sufficiency of the evidence. (See Claim III). Even if this Court had reviewed the sufficiency of the evidence, it cannot be a substitute for effective advocacy by appellate counsel:

> [O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

Wilson, 474 So. 2d at 1165. In Mr. Haliburton's case, as in Wilson, appellate counsel failed to act as a "zealous advocate," and Mr. Haliburton was therefore deprived of his right to the effective assistance of counsel. Mr. Haliburton is entitled to a new direct appeal.

CLAIM II

THE SENTENCING COURT VIOLATED THE PRINCIPLES OF LOCKETT V. OHIO, 438 U.S. 586 (1978), AND HITCHCOCK V. DUGGER, 481 U.S. 393 (1987), WHEN IT PRECLUDED MR. HALIBURTON FROM PRESENTING, AND THE JURY FROM CONSIDERING, EVIDENCE OF MITIGATING FACTORS, IN DEROGATION OF MR. HALIBURTON'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION, AND APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS MERITORIOUS CLAIM ON DIRECT APPEAL, IN VIOLATION OF MR. HALIBURTON'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

During Mr. Haliburton's penalty phase, defense counsel was precluded from presenting crucial mitigation to the jury. Counsel wished to present two prison guards from Florida State Prison to testify to Mr. Haliburton's exemplary record while on Death Row.[2] These witnesses were not permitted to testify before the jury, yet they did testify before the sentencing judge once the jurors retired to deliberate Mr. Haliburton's sentence. In

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[2]Mr. Haliburton was first tried for the murder of Donald Bohannon in 1983, when he was found guilty and sentenced to death. The conviction and sentence were reversed on appeal by this Court. Haliburton v. State, 476 So. 2d 192 (Fla. 1985). Subsequently, the United States Supreme Court vacated the reversal for reconsideration. Haliburton v. Florida, 475 U.S. 1078 (1986). On reconsideration, this Court reinstated its reversal of the conviction and sentence of death. Haliburton v. State, 514 So. 2d 1088 (Fla. 1987). Mr. Haliburton was retried in January, 1988, and again convicted and sentenced to death. His convictions and sentence were affirmed. Haliburton v. State, 561 So. 2d 248 (Fla. 1990). Certiorari review was denied by the United States Supreme Court. Haliburton v. Florida, 111 S. Ct. 2910 (1991). During the period between his first and second trials, Mr. Haliburton was on death row at Florida State Prison.

fact, the trial judge considered the evidence of the corrections guards as nonstatutory mitigation.[3]

On the morning the penalty phase was set to begin, the following discussion was had between trial counsel and the court:

> MR. BAILEY: I would like, just so we don't trip over things later, to advise the Court of a minor problem I ran into this morning which should not turn out to be a problem by the time the day is over. We have two State correctional law officers who have worked over the years since '83 with my client on death row. They're under subpoena as defense witnesses for these proceedings. Yesterday we got the airline tickets to them so they could be here this morning. Apparently they went to the airport this morning, were there when their plane was announced but didn't hear the announcement, and didn't get on. We made arrangements for them to catch another flight that would have had them here about now. Apparently they went home and got back not in time to get on the other flight. We should get them here now about 3:30 this afternoon. I hope they have the capacity to get on the airplane. I just don't know what to expect at this point.
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> * * *
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> THE COURT: Okay. Hopefully they will have the wherewithal to catch the third plane. Maybe the third time around will be a charm there. If it's a problem at the end of the day, we'll have to deal with it at that time.

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[3]In his Sentencing Order dated April 11, 1988, the trial judge wrote:

> The defense has offered evidence of non-statutory mitigating circumstances. The Defendant has spent the last four years on death row as a result of the first conviction in this case and the Court's previous sentence, during that time, the Defendant has not been the subject of any disciplinary action.

(RII. at 720-21, 723) (emphasis added).

Later on, in the middle of the defense case, trial counsel notified the court about his continuing witness problem, and the following discussion was had:

> MR. BAILEY: This is the point where I want to call the two prison guards. My investigator left to go pick them up at the airport.
>
> THE COURT: I'd like to go ahead and proceed with who you've got here, Mr. Bailey. Work them in.
>
> MR. BAILEY: Well, it's more of a matter of final impact. I'd hate for one of the last witnesses to be two death row employees.
>
> THE COURT: I just can't -- they're not going to be here till 3:45. I can't delay the trial till then to wait for them. I'll ask you to proceed.

(RII. at 847) (emphasis added).

Naturally, the witnesses arrived when defense counsel represented they would. The trial court, however, did not permit them to testify before the jury, which had already been directed to retire for deliberations. After the jury retired, counsel had the witnesses testify before the judge for his sentencing consideration. Both witnesses testified to the fact that Mr. Haliburton had no Disciplinary Reports since he had been on death row. Moreover, both witnesses indicated that they were aware of an incident involving Mr. Haliburton's assistance in helping a fellow inmate when that inmate was under a suicide watch. In fact, one of these witnesses, Sergeant Raymond Bly, was aware of the details of this incident:

> Q [By Mr. Bailey] Are you personally aware of any situation where he [Mr. Haliburton] assisted guards in kind of keeping a close watch on inmates that were a potential suicide threat?
>
> A [By Sergeant Bly] I wasn't aware of it until two days ago. I didn't know anything about that.
>
> Q You heard about that from us or --
>
> A From other officers.
>
> Q Okay. You're aware that something like that did occur; you talked to the officers that were involved directly?
>
> A Yes.

(R.II at 910) (emphasis added).

Florida statutes allow for the introduction of hearsay testimony for sentencing determination in capital proceedings. The pertinent section of the statute provides as follows:

> Any such evidence [relating to aggravating or mitigating circumstances] which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

Fla. Stat. § 921.141 (1) (1992) (emphasis added). Florida case law also provides that hearsay is admissible at a penalty phase proceeding:

> While hearsay evidence may be admissible in penalty phase proceedings, such evidence is admissible only if the defendant is accorded a fair opportunity to rebut any hearsay statements.

Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). Hearsay is admissible at a Florida sentencing phase if it is relevant and if

the defendant's constitutional right of confrontation is not violated by its introduction. Perri v. State, 441 So. 2d 606, 608 (Fla. 1983). Under Florida law, this important mitigation evidence was admissible if relevant.[4]

Both the prison guard testimony related to Mr. Haliburton's record on death row as well as the hearsay testimony should have been presented to Mr. Haliburton's sentencing jury. Evidence offered by a capital defendant during the penalty phase is relevant if it either rebuts aggravation or establishes mitigation. Skipper v. South Carolina, 476 U.S. 1 (1986). Mitigation is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978).

> Underlying Lockett and Eddings is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545 (1987) (concurring opinion).

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[4]See Green v. Georgia, 442 U.S. 95 (1979) (exclusion of mitigating evidence on the basis that it was hearsay violates the eighth amendment).

Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989). This Court has held that "[e]vents that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution." Cheshire v. State, 568 So. 2d 908 (Fla. 1990). All of the evidence discussed above was precisely the type of mitigating evidence contemplated by Lockett, as it directly related to the "defendant's character or background." Lockett, 438 U.S. at 650. However, as in Skipper and Hitchcock, the jury was precluded from hearing and considering important nonstatutory mitigation. Evidence of its importance lies in the fact that the trial court found Mr. Haliburton's death row record as a nonstatutory mitigating circumstance. The sort of evidence that counsel wished to present to the jury -- testimony relating to the positive character traits and good prison record of Mr. Haliburton -- was important for the determination whether Jerry Haliburton belongs to that class of defendants for whom the death penalty is the appropriate punishment. See Campbell v. State, 571 So. 2d 415 (Fla. 1990); Cheshire v. State, 568 So. 2d 908 (Fla. 1990).

The trial court's actions fly in the face of long-established eighth amendment jurisprudence:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider [or preclude the consideration of], as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed the jury to disregard the evidence [Mr. Haliburton] proffered on his behalf. The sentencer, and the [appellate court] on review, may

> determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings, 455 U.S. at 114-15 (footnote omitted). That a good prison record can be considered a factor in mitigation is well-settled. See Skipper v. South Carolina; Campbell v. State, 571 So. 2d at 419. By refusing to permit counsel to present this evidence to the jury, the judge denied an individualized sentencing. A more egregious or plain eighth amendment violation can hardly be imagined. See Hitchcock v. Dugger, 481 U.S. 586 (1978).

Appellate counsel for Mr. Haliburton failed to present this meritorious and compelling claim on direct appeal, and was ineffective for not doing so. See Claim I. Counsel could have no valid strategic reason for not presenting this issue. This Lockett/Skipper error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Haliburton. The error was aggravated by the erroneous jury instruction directing consideration of the heinous, atrocious, or cruel aggravating factor. Thus, the jury was denied mitigating evidence and ordered to consider improper aggravation. The balancing process was obviously and fatally skewed. Valle v. State, 502 So. 2d 1225 (Fla. 1987).

The claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal.

This issue involved a classic violation of longstanding principles of eighth amendment jurisprudence. See Lockett, Eddings, Skipper. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsely only had to direct this Court to the issue. The Court would have done the rest, based on long-settled federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Haliburton of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, 474 So. 2d at 1164-65; Matire. Accordingly, habeas relief must be accorded now.

CLAIM III

MR. HALIBURTON'S APPELLATE COUNSEL INEFFECTIVELY FAILED TO ARGUE THAT THE EVIDENCE WAS INSUFFICIENT TO PROVE MR. HALIBURTON'S GUILT AS REQUIRED BY FLORIDA STATUTES, THE FLORIDA CONSTITUTION, AND THE FEDERAL CONSTITUTION.

As stated by Jerry Haliburton's prosecutor, Gay Broome, as she prepared for trial, I will need these witnesses contacted "if I'm lucky enough to get to Phase II again." Unfortunately, Ms. Broome was lucky enough. The only piece of physical evidence of the burglary was a fingerprint on the outside of a door in a porch area. The only evidence of the murder charge was the

fingerprint and Freddie Haliburton's statement. Freddie had recanted his previous testimony under oath, and then at trial, recanted his recantation. Freddie had criminal charges hanging over his head. He had shot Jerry in the neck in an attempt to murder Jerry Haliburton. Furthermore, Freddie Haliburton faced charges of perjury per se if he failed to recant his under oath recantation of his previous testimony at Jerry's first trial. Freddie also needed the prosecutor's assistance in obtaining an early release from his imprisonment on still other charges. Under the circumstances, no rational trier of fact would believe Freddie's testimony to the exclusion of reasonable doubt.

This Court has an independent and automatic duty to review "the judgment of conviction and sentence of death." Fla. Stat. §921.141(4); Sundell v. State, 354 So. 2d 409 (Fla. 3rd DCA 1978). Because this Court did not address this issue on direct appeal of Mr. Haliburton's retrial, Mr. Haliburton is currently arguing this point under the exigencies of a warrant.

This Court has ruled that "judicially netural review . . . is no substitute for the careful, partisan scrutiny of a zealous advocate." Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). Thus, neutral review by this Court does not lessen Mr. Haliburton's constitutional right to effective assistance of counsel on direct appeal. To the extent Mr. Haliburton's appellate counsel failed to argue the facts and law presented in Mr. Haliburton's current state habeas, it was ineffective assistance of appellate counsel. See Claim I.

The only piece of physical evidence linking Jerry Haliburton to the burglary or murder charges was Jerry Haliburton's fingerprint found on the outside of the victim's apartment -- jalousies in a door facing the front porch. The state's fingerprint expert, Sergeant Wilburn, candidly admitted there was no way to date the fingerprint lifted from this jalousie. Sergeant Wilburn even stated that Jerry Haliburton's fingerprint could have been up to five years old (RII. 382). In specific, Sergeant Wilburn admitted that this fingerprint could have been from a July 4, 1981, burglary of the victim's apartment. The July 4, 1981 burglary had a similar modus operandi -- as do nearly all of the South Florida burglaries (remove jalousies and enter).

Teresa Kast testified at retrial that Danny Lee, her roommate at the time of the offense, had told her that Jerry Haliburton told him that Jerry was shocked to hear the victim was dead because Jerry was just partying with him the night he died (RII. 323-25). By partying, Jerry meant smoking pot, which the victim did often according to Teresa Kast (RII. 316). This was a further explanation for the fingerprint.

In fact, the state failed to get an indictment on the murder charge with the fingerprint evidence alone. The grand jury refused to return an indictment on this evidence. An indictment was returned only after the state obtained the testimony of Freddie Haliburton. Fingerprint evidence is not valuable unless it can be tied to the time when the crime was committed. State

v. Hayes, 333 So. 2d 51 (Fla. 4th DCA 1976). In Hayes, the defendant's prints matched a print found on a removed jalousie found near the home. It could not be determined when the latent from the jalousie was made. It could not be shown whether the defendant was given permission to be on the premises. Moreover, the victim's house had been burglarized just three weeks earlier. The Hayes court held that this evidence of a fingerprint was insufficient to establish the defendant's conviction because it was not proven the print could only have been made at the time of the crime. Hayes, 333 So. 2d at 54.

Furthermore, when Roger Miller entered the victim's house, the rear door was open. Thus, the perpetrator of the murder could have used a key. Like the defendant in Hayes, Jerry Haliburton's fingerprints could have come from a prior social visit (to smoke pot), from inadvertently touching the removed jalousie panes or helping to put them in, or from a burglary four months earlier. The fingerprints were found on the outside of the apartment on jalousies that were removed and placed near the victim's apartment. It is also not unreasonable to assume Jerry Haliburton's prints came from prior access to the victim's apartment (i.e. a social visit, to help put jalousies into the door, or a prior burglary). See Hayes; Williams v. State, 308 So. 2d 595 (Fla. 1st DCA 1975).

There was not competent, substantial evidence that Jerry Haliburton's fingerprint was tied to the time the murder was committed. No rational trier of fact could conclude that the

fingerprint established that Jerry Haliburton committed a burglary on the night in question. The evidence presented was inconsistent with any reasonable hypothesis of innocence.

The only other evidence of a burglary was the victim had recently received a paycheck and money could not be found -- despite Teresa Kast's testimony that he hid his money. This evidence does not establish beyond a reasonable doubt that a burglary occurred and that Jerry Haliburton committed it. No reasonable juror could have found proof of Jerry Haliburton's guilt beyond a reasonable doubt based on this circumstantial evidence as to the burglary or murder charges.[5] In fact, reasonable jurors would have responded as the grand jury did and said the evidence is insufficient.

Sharon Williams' testimony at Mr. Haliburton's retrial did not reveal any details of the crime for which Jerry Haliburton was charged. At most, it showed Sharon Williams' hatred for the Haliburton family as a whole.

Freddie Haliburton's deposition testimony taken in 1987 directly recanted his testimony at the first trial and contradicted his retrial testimony. Freddie Haliburton's trial testimony was per se incredible. He had told two diametrically opposite stories while under oath. No rational trier of fact could conclude that one version was true beyond a reasonable

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[5]This standard was used by this Court in Midstate Hauling Company v. Fowler, 176 So. 2d 87 (Fla. 1965) and Pfister v. Parkway General Hospital, Inc., 405 So. 2d 1011 (Fla. 1981). This standard is similar to the standard in Jackson v. Virginia, 433 U.S. 307 (1979).

doubt. Freddie Haliburton's retrial testimony was also suspect due to an attempted murder charge still hanging over his head -- Freddie Haliburton shot Jerry Haliburton in the neck. The state could still charge him with attempted murder.

The jury would not convict based on Freddie's testimony and made a request to hear four sections of testimony. The testimony requested involved the crime scene including the fingerprints found on the jalousie pane. As noted that the fingerprint evidence alone is legally insufficient in Jerry Haliburton's case to be found guilty beyond a reasonable doubt on the burglary and murder charges. The first grand jury properly failed to indict Jerry on the murder charge finding the fingerprint evidence insufficient. The fingerprint alone is insufficient, Sharon Williams' testimony was not relevant, and Freddie Haliburton's testimony was per se incredible. No reasonable juror could have found Jerry Haliburton guilty of either charges beyond a reasonable doubt.

The dearth of evidence linking Jerry Haliburton to the burglary and murder convictions and sentences was insufficient to sustain the conviction. It violates due process of law to convict an individual when no rational finder of fact could find him or her to be guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979). No rational finder of fact could have found Mr. Haliburton guilty of first-degree murder beyond a reasonable doubt. His first-degree murder conviction should have

been reversed. However, appellate counsel failed to raise the issue.

The federal standard for weighing the constitutional sufficiency of the evidence is set forth in Jackson v. Virginia, 433 U.S. 307 (1979):

> [T]he applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

This Court must view the evidence in the light most favorable to the prosecution. "If the reviewing court is convinced by the evidence only that the defendant is more likely than not guilty, then the evidence is not sufficient for conviction." Cosby v. Jones, 682 F.2d 1373, 1379 (11th Cir. 1982). See also County Court of Ulster County v. Allen, 442 U.S. 140 (1979). "[I]f the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain reasonable doubt." Cosby, 682 F.2d at 1383.

The claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of federal constitutional law. See Jackson v. Virginia. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no

elaborate presentation -- counsely only had to direct this Court to the issue. The Court would have done the rest, based on long-settled federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Haliburton of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, 474 So. 2d at 1164-65; Matire. Accordingly, habeas relief must be accorded now.

CLAIM IV

THE TRIAL COURT REFUSED TO PERMIT DEFENSE COUNSEL TO ARGUE IN SUMMATION THAT THE STATE HAD FAILED TO OBTAIN AN INDICTMENT AGAINST MR. HALIBURTON BASED SOLELY UPON PHYSICAL EVIDENCE, THEREBY CONSTRAINING DEFENSE COUNSEL FROM PRESENTING A MERITORIOUS DEFENSE, AND APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT THIS ISSUE ON DIRECT APPEAL, IN VIOLATION OR MR. HALIBURTON'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

During the guilt/innocence portion of Mr. Haliburton's capital trial, defense counsel attempted to argue in his summation that the grand jury could not and did not indict Jerry Haliburton for murder based on the sole piece of physical evidence -- a fingerprint on a jalousie window pane. The defense case was grounded on reasonable doubt, with defense counsel attacking the sufficiency of the state's case against Jerry Haliburton:

> MR. BAILEY: The prosecutor says Teresa [Kast] wouldn't have had to break in, she could have gone in the door with her own key if that were the case. If the facts are consistent with what I've suggested to you, and they clearly are, as one of several possibilities in this case, obviously she or whoever was working with her would have done something to try to cover up -- to make it look like a break-in or something of that nature. How else do you explain the open cut on Teresa and her urgency in accounting for that when she was on the stand?
> The fact is, from the evidence you heard from this stand, you know that the grand jury did not and could not charge Jerry --
>
> MS. BROOME: Objection, Your Honor.
>
> THE COURT: Sustained.

(RII. at 660-61) (emphasis added). No grounds for the prosecutor's objection were stated, nor were the reasons for sustaining her objection told to counsel.

This testimony was crucial, as counsel went on to explain the importance of Freddie Haliburton's testimony and the weight that the jury should give not only his testimony, but also to the state's case in general:

> MR. BAILEY: You had testimony from Freddie Haliburton that sometime after he went to the police in March of 1982 and related events about a crime that occurred in August of 1981, sometime after he went to the police in March, he testified in front of the grand jury, he testified here that he did that in front of the grand jury in order to get Jerry charged with this murder. From all the evidence in this case, you know that the State's case rests totally upon Freddie Haliburton. And I am simply suggesting to you the obvious, you cannot believe Freddie Haliburton beyond a reasonable doubt, a man who wants his brother dead, a man who had shot his brother, a man who lies against his brother.

(RII. at 661) (emphasis added).

It is thus clear that Freddie Haliburton was the key to the state's case, and his credibility and motive for testifying was an integral part of Mr. Haliburton's defense. The fact that the grand jury failed to indict Mr. Haliburton for murder until Freddie Haliburton came along makes his role even more pivotal, and cast substantial and reasonable doubt on the state's almost non-existent physical evidence. Mr. Haliburton's jury had every right to know that, when the case was presented to the grand jury based solely upon the fingerprint evidence, an indictment was not returned. The state needed Freddie Haliburton's evidence to get an indictment. Without it, there was no case as the grand jury held. Freddie knew this. In evaluating his testimony, the jury needed to know this. Freddie literally tried to kill Jerry Haliburton (he shot him in the neck), the very same day he went to the police with his claim that Jerry confessed to him. In evaluating Freddie's motives, the trial jury needed to know that without Freddie the state had no case because the grand jury refused to indict. But Freddie gave the state the ammoit needed to nail Jerry.

That the right to present a defense in a criminal case is grounded in due process is beyond question. In Chambers v. Mississippi, 410 U.S. 284 (1973), the United States Supreme Court invalidated a state hearsay rule on the ground that it abridged a defendant's right to present a defense, thereby violating due process. Chambers, 410 U.S. at 302. "The right of an accused in

a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Id. at 294.

Moreover, in Rock v. Arkansas, 483 U.S. 44 (1987), the Supreme Court adhered to its ruling in Chambers when it invalidated a state rule which provided for the per se exclusion of all hypnotically refreshed testimony. Id. at 62. The Rock ruling was also based upon due process of the fourteenth amendment.

Similarly, in Olden v. Kentucky, 109 S. Ct. at 483, the Supreme Court was presented with a case where the Kentucky courts, pursuant to a Rape Shield Law, had limited the right to defend. In reversing the Supreme Court stated:

> In Davis v. Alaska, we observed that, subject to "the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation ..., the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." Id., at 316, 94 S.Ct., at 1110. We emphasized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Id., at 316-317, 94 S.Ct. at 1110, citing Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959). Recently, in Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), we reaffirmed Davis, and held that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical from of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.'" 475 U.S., at

680, 106 S.Ct., at 1436, quoting Davis, supra, 415 U.S., at 318, 94 S.Ct., at 1111.

> In the instant case, petitioner has consistently asserted that he and Matthews engaged in consensual sexual acts and that Matthews--out of fear of jeopardizing her relationship with Russell--lied when she told Russell she had been raped and has continued to lie since. It is plain to us that "[a] reasonable jury might have received a significantly different impression of [the witnesses'] credibility had [defense counsel] been permitted to pursue his proposed line of cross- examination." Delaware v. Van Arsdall, supra, 475 U.S., at 680, 106 S.Ct., at 1436.

The Kentucky Court of Appeals justified the limitation of the cross-examination on the basis of the prejudice to the alleged victim, Matthews. "[T]he court held that petitioner's right to effective cross-examination was outweighed by the danger that revealing Matthews' interracial relationship would prejudice the jury against her." Olden, 109 S. Ct. at 483. However, the Supreme Court noted that Matthews, the alleged victim, gave testimony that "was central, indeed crucial, to the prosecution's case." Id. at 484. Her testimony was directly contradicted by the defendant's testimony. As a result, evidence going towards her motives to lie and testify against the defendant could not be excluded on the basis of "[s]peculation as to the effect of jurors' . . . biases." Id. at 483.

The United States Supreme Court's summary reversal of Olden's conviction was premised upon the Court's conclusion that the Kentucky court had "failed to accord proper weight to petitioner's Sixth Amendment right 'to be confronted with the

witnesses against him.'" 109 S. Ct. at 482-83. The court found error saying:

> It is plain to us that "[a[reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross- examination." Delaware v. Van Arsdall, supra, 475 U.S., at 680, 106 S.Ct., at 1436.

109 S. Ct. at 483.

The constitutional error, here, contributed to Mr. Haliburton's conviction. The error can by no means be deemed harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673 (1986); Chapman v. California, 386 U.S. 18 (1967). The Court's ruling limiting the defense allowed Freddie's testimony to survive "the crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. 648 (1984), 104 S. Ct. 2039 (1984).

This violation of the confrontation clause allowed the jury to assess his testimony without the knowledge that the state and Freddie both knew without his testimony there was no case. The jury should have been granted the opportunity to weigh Freddie's testimony after full disclosure of the facts and circumstances. As the United States Court has held:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court oflaw. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The

> very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

United States v. Nixon, 418 U.S. 683, 709 (1974).

The limitation here prevented the jury from reaching a reliable verdict. This error cannot be found to be harmless beyond a reasonable doubt when consideration is given to how difficult the deliberations were for the jury.

Mr. Haliburton's case, however, is not one of those instances where his right to argue should "bow to accommodate other legitimate interests in the criminal trial process." Id. Mr. Haliburton clearly had the right to present a defense in his case. Chambers. The state had no legitimate interest in not allowing counsel to point out the weakness of the prosecution's case against his client, other than preventing the jury from knowing that its case, minus Freddie Haliburton's testimony, was a weak one.

Without a doubt this information should have been allowed for the jury's consideration. The jury that decided that Jerry Haliburton should die was unaware of the fact that without Freddie Haliburton, there would have been no murder indictment, much less a conviction and death sentence. Moreover, this critical issue was not raised on direct appeal, as it clearly should have. Appellate counsel was ineffective for failing to do so. See Claim I.

The claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and

prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of federal constitutional law. See Chambers, Rock, Olden. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsely only had to direct this Court to the issue. The Court would have done the rest, based on long-settled federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Haliburton of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, 474 So. 2d at 1164-65; Matire. Accordingly, habeas relief must be accorded now.

CLAIM V

MR. HALIBURTON'S RIGHT TO A RELIABLE CAPITAL SENTENCE WAS VIOLATED WHERE HIS SENTENCING JURY DID NOT RECEIVE INSTRUCTIONS GUIDING AND CHANNELING ITS SENTENCING DISCRETION BY EXPLAINING THE LIMITING CONSTRUCTIONS OF THE AGGRAVATING CIRCUMSTANCES SUBMITTED TO IT. AS A RESULT, THE JURY HAD UNBRIDLED DISCRETION TO DETERMINE WHETHER THE AGGRAVATING CIRCUMSTANCES EXISTED, WHETHER, IF THEY EXISTED, THEY WERE SUFFICIENT TO WARRANT A DEATH SENTENCE, AND WHETHER, BALANCING THE AGGRAVATING CIRCUMSTANCES AND THE EVIDENCE OFFERED IN MITIGATION, A DEATH SENTENCE SHOULD BE RECOMMENDED.

This claim was presented on direct appeal[6] but new case law establishes that this Court's analysis was in error. See Shell v. Mississippi, 111 S. Ct. 313 (1990).

At the penalty phase of Mr. Haliburton's trial, the jury was instructed to consider five aggravating circumstances. These circumstances were:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: One, the crime for which Jerry Haliburton is to be sentenced was committed under sentence of imprisonment; two, the defendant has been previously convicted of another capital offense or other felony involving the use or threat of violence to some person; the crimes of robbery and attempted sexual battery are felonies involving the use or a threat of violence to another person; three, the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of burglary; four, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel; atrocious means

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[6]To the extent that the state contends that appellate counsel failed to clearly state this issue on direct appeal, appellate counsel's performance was deficient. See Claim I.

> outrageously wicked and vile and cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others; five, the crime for which the defendant is to be sentenced was committed in a cold, calculated --
>
> Mr. Bailiff, don't leave the courtroom while the Judge -- have a seat, please.
>
> Five, the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretence of moral or legal justification.
>
> If you find the aggravating circumstances do not justify the death penalty, you're advisory sentence should be one of life imprisonment without the possibility of parole for 25 years. Should you find that sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(RII. 899-900).

Under Florida law aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 528 (Fla. 1989). In fact, Mr. Haliburton's jury was so instructed. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988).

Unfortunately, Mr. Haliburton's jury received no instructions regarding the elements of the aggravators even through defense counsel argued and proposed more detailed jury instructions. Over objection, the standard instructions were

read, and it was implied that the aggravators had already been found to apply and that the jury was obligated to accept that finding (RII. 733).

Under Florida law, the sentencing jury may reject or give little weight to any particular aggravating circumstance. A binding life recommendation may be returned because the aggravators are insufficient. Hallman v. State, 560 So. 2d 223 (Fla. 1990). Thus, the jury's understanding and consideration of aggravating factors may lead to a life sentence. Yet, Mr. Haliburton's jury was not given adequate guidance as to what was necessary to establish the presence of an aggravator. This left the jury with unbridled discretion. This violated the eighth amendment.

This Court addressed this issue on direct appeal. However, since that opinion was issued, new case law has established that Mr. Haliburton is entitled to relief. In Shell v. Mississippi, 111 S. Ct. 313 (1990), the Supreme Court found that a limiting instruction can only be used to give content to a statutory factor that is itself too vague if the limiting instruction's own definitions are constitutionally sufficient and provide some guidance to the sentencer.

A. HEINOUS, ATROCIOUS OR CRUEL

As to the fourth aggravating factor submitted for the jury's consideration, the jury was simply told "the crime . . . was especially wicked, evil, atrocious, or cruel" (RII. 999). The instructions defined atrocious as outrageously wicked or vile.

In Maynard v. Cartwright, 108 S. Ct. 1853 (1988), more detailed language than that used here was found to be insufficient to narrow this aggravator and rendered a resulting death sentence a violation of the eighth amendment.

In Proffitt v. Florida, 428 U.S. 242 (1976), the Supreme Court approved this Court's limiting construction of the "heinous, atrocious, or cruel" aggravating circumstance:

> [The Florida Supreme Court] has recognized that while it is arguable "that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v. State, 322 So. 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So. 2d, at 9. See also Alford v. State, 307 So. 2d 433, 445 (1975); Halliwell v. State, [323 So. 2d 557], at 561 [Fla. 1975]. We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

Proffitt, 428 U.S. at 255-56 (footnote omitted)(emphasis added).

The limitation approved in Proffitt was not utilized at any stage of the proceedings in Mr. Haliburton's case. The jury was simply instructed that it could consider as one of the aggravating circumstances whether "the crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel." (RII. 999). The court defined atrocious as outrageously wicked or vile. The jury was never instructed that this aggravator applied only to the conscienceless or pitiless

crime which is unnecessarily torturous to the victim. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied sub nom., Hunter v. Florida, 416 U.S. 943 (1974); see also Alford v. State, 307 So. 2d 433, 445 (1975), cert. denied, 428 U.S. 912; Halliwell v. State, 323 So. 2d 557, 561 (Fla. 1975); Herzog v. State, 439 So. 2d 1372 (Fla. 1983). See Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990).

In Maynard, the jury found the murder to be "especially heinous, atrocious, or cruel," Maynard, 108 S. Ct. at 1856, and the state supreme court affirmed. Id. The United States Supreme Court affirmed the Tenth Circuit's grant of relief, explaining that this procedure did not comply with the fundamental eighth amendment principle requiring the limitation of capital sentencers' discretion. The Supreme Court's eighth amendment analysis fully applies to Mr. Haliburton's case. The result here should be the same as Maynard.

In Shell v. Mississippi, 111 S. Ct. 313 (1990), the trial court had instructed the jury that it could consider whether the murder was "especially heinous, atrocious or cruel." It had further provided a limiting instruction:

> [T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others.

Id. at 313. These definitions were in fact identical to those given to Mr. Haliburton's jury, yet the Supreme Court found them inadequate. The Court stated,

> Obviously, a limiting instruction can be used to give content to a statutory factor that "is itself too vague to provide any guidance to the sentencer" only if the limiting instruction's own "definitions are constitutionally sufficient," that is, only if the limiting instruction itself "provide[s] some guidance to the sentencer." Walton v. Arizona, [], 110 S.Ct. 3047, 3057, [] (1990).

Shell, 111 S. Ct. at 314. The Court concluded, as it had in Maynard, that the instructions left the aggravator unconstitutionally vague.

Shell is new case law decided after Mr. Haliburton's direct appeal which establishes that this Court erred in its analysis. The United States Supreme Court held that an instruction identical to the one at issue here was insufficient under the eighth amendment. Shell must be applied to Mr. Haliburton's case and a resentencing ordered.

In Mr. Haliburton's case, the jury was never guided or channeled in its sentencing discretion. No constitutionally sufficient limiting construction, as construed in Dixon and approved in Proffitt, was ever applied to the "heinous, atrocious, or cruel" aggravating circumstance before this jury. Moreover, this aggravator only applies where evidence shows beyond a reasonable doubt that the defendant knew or intended the murder to be especially heinous, atrocious or cruel. Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991)(this "aggravating factor cannot be applied vicariously"); Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990)(heinous, atrocious or cruel aggravator does not apply when the crime was "not a crime that was meant to

be deliberately and extraordinarily painful")(emphasis in original). In Mr. Haliburton's case, the jury did not receive an instruction regarding the limiting construction of this aggravating circumstance. The judge relied upon the jury's death recommendation; in fact, he gave it great weight. Yet, he ruled as a matter of law this aggravator factor was not present in the case. However, the jury's death recommendation was tainted by its consideration of this aggravator. As a result, the penalty phase instructions on this aggravating circumstance "fail[ed] adequately to inform [Mr. Haliburton's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 108 S. Ct. at 1858. Accordingly, this instruction was erroneous and prejudicial to Mr. Haliburton.

B. COLD, CALCULATED AND PREMEDITATED

As to the fifth aggravating factor submitted for the jury's consideration, the jury was simply told "the crime . . . was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification" (RII. 999). The jury was not provided with further instructions defining these terms on the application of this aggravator. As the record reflects, the jury was never given a limiting construction on the cold, calculated and premeditated aggravating circumstance. Although this issue was considered on direct appeal, Mr. Haliburton submits that this Court must reconsider its findings relative to Shell v. Mississippi.

Aggravating circumstance (5)(i) of Section 921.141, Florida Statutes, is unconstitutionally vague, overbroad, arbitrary, and capricious on its face. This circumstance is to be applied when:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Section 921.141(5)(i), Fla. Stat.

This Court has attempted to limit this overbroad aggravator by holding that it is reserved for murders "characterized as execution or contract murders or those involving the elimination of witnesses." Green v. State, 583 So. 2d 647, 652 (Fla. 1991); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985). In Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), this Court held that "calculated" consists "of a careful plan or prearranged design." Moreover, "premeditation" requires a heightened form of premeditation. The simple form of premeditation sufficient to support a conviction of murder is insufficient to support this aggravator; greater evidence is required. Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988); Holton v. State, 573 So. 2d 284, 292 (Fla. 1991). However, these limitations designed to narrow and limit the scope of this otherwise open-ended aggravator were not provided to Mr. Haliburton's jury. Thus, the jury in Mr. Haliburton's case had unbridled and uncontrolled discretion to apply the death penalty. The necessary limitations and definitions were not applied. This violated Maynard v. Cartwright and Shell v. Mississippi.

Mr. Haliburton was denied his eighth and fourteenth amendment rights to have aggravating circumstances properly limited for the jury's consideration. The jury's discretion was unlimited in violation of the eighth amendment.

C. UNDER SENTENCE OF IMPRISONMENT

Mr. Haliburton's jury was instructed that it could consider that "the crime . . . was committed while under sentence of imprisonment" (RII. 899). The jury was not told that the weight of this aggravator was less if the defendant had not committed the homicide after escaping. In Songer v. State, 544 So. 2d 1010 (Fla. 1989), this Court indicated the gravity of this aggravator is diminished since the defendant "did not break out of prison but merely walked away from a work-release job." 544 So. 2d at 1011.

The jury was not advised that the weight of this aggravator was lessened if Mr. Haliburton obtained his release from prison by legal and non-violent means. In considering this aggravator, the jury needed to be fully instructed. In Mr. Haliburton's case, the jury did not receive an instruction regarding this limitation on the consideration of aggravating circumstances. As a result, the penalty phase instructions on aggravating circumstances "fail[ed] adequately to inform [Mr. Haliburton's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 108 S. Ct. at 1858. Accordingly, Mr. Haliburton was prejudiced by the unbridled discretion granted his sentencing jury.

D. IN THE COURSE OF A BURGLARY

As to the third aggravating factor submitted to the jury, the jury was simply told "the crime . . . was committed while he was engaged in the commission of the crime of burglary" (R. 899). However, the jury was not told that this aggravating factor standing alone was insufficient to support a death sentence. Proffitt v. State, 510 So. 2d 896 (Fla. 1987). As a result, the penalty phase instruction on this aggravating circumstance "fail[ed] adequately to inform [Mr. Haliburton's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 108 S. Ct. at 1858. Accordingly, this factor must be stricken.

E. PREJUDICE

This Court has produced considerable case law regarding the import of instructional error to a jury regarding the mitigation it may consider and balance against aggravation. In Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988), a new sentencing was ordered because the jury had not received an instruction explaining that mitigation was not limited to the statutory list. The error was reversible, even though at a resentencing to the judge alone, the judge had known that mitigation was not limited to the statutory mitigating factors. Because of the weight attached to the jury's sentencing recommendation in Florida, the Court found that it could not "conclude beyond a reasonable doubt that an override would have been authorized." In other words, there was sufficient mitigation in the record for the jury to have a

reasonable basis for recommending life and thus preclude a jury override. See Tedder v. State, 322 So. 2d 908 (Fla. 1975); Omelus v. State.

In Mr. Haliburton's case the jury received no guidance as to the "elements" of the aggravating circumstances against which mitigation was to be balanced. Therefore, the sentencing jury was left with vague aggravating circumstances. Yet, the pivotal role of a Florida jury in the capital sentencing process demands that the jury be informed of such limiting construction so their discretion is properly channeled. Failure to provide Mr. Haliburton's sentencing jury with such limitations is constitutionally improper under the Eighth Amendment. The error was aggravated by the trial court's erroneous exclusion of Lockett/Skipper evidence. Not only did the jury receive an improper instruction on the heinous, atrocious or cruel aggravating factor, but critical mitigating evidence was precluded. (See Claim II). Thus, the jury was denied mitigating evidence and ordered to consider improper aggravation. The balancing process was obviously constitutionally skewed. Valle v. State, 502 So. 2d 1225 (Fla. 1987).

In Maynard v. Cartwright, the Supreme Court held "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." 108 S. Ct. at 1858. There must be a "principled way to distinguish [the] case, in which the death

penalty was imposed, from the many cases in which it was not." Id. at 1859, quoting, Godfrey v. Georgia, 446 U.S. 420, 433 (1980). Although Maynard was specifically concerned with Oklahoma's application of the "heinous, atrocious, or cruel" aggravator, the principles discussed in Maynard are applicable to the other aggravators previously mentioned.

The trial court refused to find that the murder was "heinous, atrocious and cruel". Yet, the jury instructions told the jury to weigh this aggravating factor. The sentencing jury never knew that as a matter of law one of the five aggravators it was instructed upon could not be considered in weighing the aggravating circumstances against the mitigating circumstances.

The failure to instruct on the limitations left the jury free to ignore the limitations, and left no principled way to distinguish Mr. Haliburton's case from a case in which the limitations were applied and death, as a result, was not imposed. A properly instructed jury would have had no more than three aggravating circumstances (and probably less) to weigh against the mitigation offered by the defense. Where improper aggravating circumstances are weighed by the jury, "the scale is more likely to tip in favor of a recommended sentence of death." Valle v. State, 502 So. 2d 1225 (Fla. 1987). The jury was left with open-ended discretion found to be invalid in Furman v. Georgia, 408 U.S. 238 (1972), and Maynard v. Cartwright.

Further, the jury in Florida is the "actual" sentencer absent some flaw regarding which "no reasonable person could

differ" that death is an appropriate punishment.[7] Thus, the sentencing jury must receive instructions comporting with eighth amendment principles.[8] In Hitchcock, the Supreme Court reversed a Florida death sentence because "the jury was not instructed to consider . . . evidence of nonstatutory mitigating circumstances." 481 U.S. 398-99 (emphasis added). Under Florida law, the jury weighs the aggravating circumstances and the mitigating circumstances. If the jury must be properly instructed as to the mitigating circumstances, certainly it must also be properly instructed as to the aggravating circumstances.

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[7]See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (a jury's sentence of life imprisonment carries great weight; the trial court and the Florida Supreme Court are all bound by the jury's recommended sentence; the jury's decision cannot be overridden unless "no reasonable person could differ" that death is an appropriate punishment.) Cf. Lewis v. Jeffers, 110 S. Ct. 3092, 3103 (1990).

[8]1990-1991 override cases demonstrate that the jury is the actual sentencer under Tedder.

- 1990 - This Court granted relief in all 5 jury override cases. See, Morris v. State, 557 So. 2d 27 (Fla. 1990); Hallman v. State, 560 So. 2d 223 (Fla. 1990); Carter v. State, 560 So. 2d 1166 (Fla. 1990); Cheshire v. State, 568 So. 2d 908 (Fla. 1990); Buford v. State, 570 So. 2d 923 (Fla. 1990).

- 1991 - This Court granted relief in 10 of 11 jury override cases. See, Dolinski v. State, 576 So. 2d 271 (Fla. 1991); Douglas v. State, 575 So. 2d 165 (Fla. 1991); Hegwood v. State, 575 So. 2d 170 (Fla. 1991); Downs v. State, 574 So. 2d 1095 (Fla. 1991); McCrae v. State, 582 So. 2d 613 (Fla. 1991); Cooper v. State, 581 So. 2d 49 (Fla. 1991); Bedford v. State, 16 Fla. L. Week. S665 (Fla. Oct. 10, 1991); Craig v. State, 585 So. 2d 278 (Fla. 1991); Savage v. State, 16 Fla. L. Week. S647 (Fla. 1991); Wright v. State, 586 So. 2d 1024 (Fla. 1991); Ziegler v. State, 580 So. 2d 127 (Fla. 1991).

Indeed, given the peculiarities of Florida's capital sentencing structure, aggravating circumstances are arguably more important to the question of whether the defendant will live or die than mitigating factors because Florida's scheme requires (and Mr. Haliburton's jury was instructed on) a preliminary finding "that sufficient [statutory] aggravating circumstances exist" in order for the defendant to even be eligible for the death penalty. Hallman v. State, 560 So. 2d 223, 227 (Fla. 1990)(life sentence could reasonably be based on a determination aggravating factors "were entitled to little weight").

A number of decisions discuss the meaning of and deference which must be accorded to a Florida jury's sentencing verdict. All of these cases emphasize that instructional error before a Florida capital sentencing jury requires resentencing. In Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987), the panel reversed saying:

> Whether or not the trial court believed it could consider nonstatutory mitigating circumstances, Magill's sentence must be vacated because the jury was led to believe its inquiry was so limited.

Magill v. Dugger, 824 F.2d 879, 893 (11th Cir. 1987)(emphasis added). In Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988), the court addressed Hitchcock instructional error, finding eighth amendment error:

> Petitioner contends that his death sentence should be set aside because the trial judge, in charging the jury as to its sentencing options, to wit, the death penalty or imprisonment for life, precluded the jury from considering evidence before the jury

> which, petitioner contends, may have prompted it to recommend a life sentence. The eighth and fourteenth amendments require that the sentencer in a capital case consider any evidence which mitigates against the imposition of the death penalty. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality).

848 F.2d 1512, 1518 (11th Cir. 1988)(emphasis added). Footnote 8 explained:

> Although the jury is not the sentencer in Florida's capital sentencing scheme, it is treated as such for eighth and fourteenth amendment purposes. See, e.g., Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

Id. (emphasis added).

In Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989), the panel specifically addressed whether Hitchcock instructional error to the jury was cured when the sentencing judge considered the nonstatutory mitigation before passing sentencing:

> Because the trial judge considered Jones' nonstatutory mitigating evidence in reaching his sentencing decision, the State next argues that this "curative action" rendered the erroneous instruction harmless. We do not agree. This case is nearly identical to Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987), also involving Florida's capital sentencing scheme, in which we held that a trial court cannot, by specifically considering nonstatutory mitigating evidence, cleanse a jury recommendation which is tainted by Lockett error. Because of the importance of the advisory jury in the Florida capital sentencing scheme, we held that Lockett "error can be cured only by a sentencing proceeding before a new advisory jury." Id. at 894.
>
> We applied this same reasoning to jury recommendations which were tainted by

> Caldwell error in our decision in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc). We observed in Mann that "the Supreme Court of Florida has recognized that a jury recommendation of death has a sui generis impact on the trial judge, an impact so powerful as to nullify the general presumption that a trial judge is capable of putting aside error." Id. at 1454. Here, as in Magill and Mann, we conclude that, because the jury recommendation resulted from an unconstitutional procedure, the entire sentencing process has necessarily been tainted. The trial judge's consideration of nonstatutory mitigating evidence, therefore, did not render harmless the Lockett error.

867 F.2d at 1280 (footnotes omitted)(emphasis added).

In contexts other than Hitchcock, courts have held that Florida juries are sentencers for eighth amendment purposes. Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(in banc), cert. denied, 109 S. Ct. 1353 (1989); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

Mr. Haliburton's jury was not adequately or accurately instructed. The jury was in fact misled by the instructions and the prosecutor's argument as to what was necessary to establish the presence of the aggravating circumstance and to support death. The jury was given no instruction limiting the construction placed upon "heinous, atrocious or cruel," nor "cold, calculated, and premeditated." In fact, the instruction given here contained even less guidance than the one given in Maynard v. Cartwright. See Coleman v. Saffle, 869 F.2d 1377, 1384 n.7 (10th Cir. 1989). Undeniably, the eighth amendment was violated.

In Mr. Haliburton's case, both statutory and nonstatutory mitigating circumstances are set forth in the record. First, the record clearly established that Mr. Haliburton was a good prisoner (of course, the jury did not hear this evidence). Mr. Haliburton caused no trouble while incarcerated prior to and during trial, and even after he had been convicted of first-degree murder (R. 2258). Evidence was also presented by Mr. Haliburton that he had been kind to family, friends and even strangers. The state did not contest this evidence (R. 2283). Under Skipper v. South Carolina, 476 U.S. 1 (1986), this evidence could have justified a life sentence.

Additionally, Mr. Haliburton's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as reflected by the frenzied nature of the crime and Mr. Haliburton's purported statement to Freddie Haliburton that "he didn't realize what he was doing until he saw the blood" (RII. 528).

F. CONCLUSION

This Court has recognized that the factors urged by Mr. Haliburton are mitigating and would preclude a jury override if a life recommendation were returned. See, e.g., Perry v. State, 522 So. 2d 817 (Fla. 1988); Foster v. State, 518 So. 2d 901 (Fla. 1987). Instructional error cannot be harmless where there was evidence in mitigation upon which a properly instructed jury could have premised a life recommendation. The jury must then be allowed to balance the statutorily defined aggravating

circumstances and the evidence in mitigation and make a sentencing recommendation. Here, since mitigation existed in the record, the error cannot be found to be harmless beyond a reasonable doubt. Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989).

There is no question that the merits of this claim are properly before this Court. Shell is new law which warrants Rule 3.850 relief. Mr. Haliburton's sentencing jury was not properly instructed regarding the limiting constructions applicable to the aggravating circumstances upon which the jury was to base its sentencing recommendation and which the jury was to weigh against mitigating circumstances. Thus, the jury's sentencing discretion was not suitably guided and channeled under Cartwright. Mr. Haliburton's death sentence therefore violated the eight amendment. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

The claims presented herein involved ineffective assistance of counsel, fundamental constitutional error and significant changes in the law. Because the foregoing claims presented substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Haliburton's capital conviction and sentence of death, and of this Court's appellate review, they should be determined on their merits. At this time, a stay of execution, and a remand to an appropriate trial level tribunal for the requisite findings on contested evidentiary issues of fact -- including inter alia appellate counsel's

deficient performance -- should be ordered. The relief sought herein should be granted.

WHEREFORE, Jerry Haliburton, through counsel, respectfully urges that the Court issue its writ of habeas corpus and vacate his unconstitutional conviction and sentence of death. He also prays that the Court stay his execution on the basis of, and in order to fully determine, the significant claims herein presented.

Mr. Haliburton urges that the Court grant him habeas corpus relief, or alternatively, a new appeal, for all the reasons set forth herein, and that the Court grant all other and further relief which the Court may deem just and proper.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 17, 1992.

LARRY HELM SPALDING
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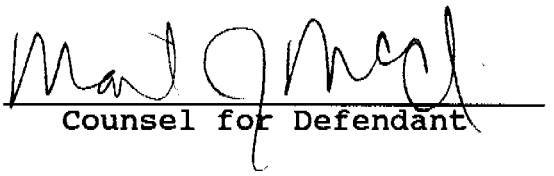
By: 
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